

A v STATE OF NEW SOUTH WALES & ORS (S59/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 2 September 2005

Date of grant of special leave: 10 February 2006

The Appellant brought proceedings for malicious prosecution, false imprisonment, false arrest and abuse of process against the Second Respondent, the Second Respondent's employer ("the First Respondent") and another police officer. This followed the dismissal of two charges of homosexual intercourse against him under section 78H of the *Crimes Act 1900* (NSW). The trial judge found that the claim of malicious prosecution was established against the First and Second Respondents in respect of one charge only. (The First Respondent's liability was based upon its vicarious liability as the Second Respondent's employer.) His Honour however dismissed the rest of the Appellant's claims.

The Appellant appealed against the dismissal of the other claim for malicious prosecution. He also appealed against the dismissal of the claims for false imprisonment, false arrest and abuse of process. The Appellant further appealed against various components of the award of damages. The First and Second Respondents cross-appealed, seeking a verdict on both claims of malicious prosecution.

In determining whether the Respondents had acted without reasonable and probable cause in laying the charges, the trial judge applied the test stated by Jordan CJ in *Mitchell v. John Heine & Son Ltd* ("*Mitchell*"). At the outset of the appeal however, the Court raised the issue of whether Jordan CJ's statement was contrary to those made by this Court in *Sharp v. Biggs* ("*Sharp*") and *Commonwealth Life Assurance Society Ltd v. Brain*. One of the main issues upon the appeal therefore was the identification of the proper test to apply in such cases.

On 2 September 2005 the Court of Appeal (Beazley JA, with whom Mason P and Pearlman AJA agreed) held that an accused must show that a prosecutor acted maliciously and with want of reasonable and probable cause to succeed in an action for malicious prosecution. They also found that a prosecutor will act without reasonable and probable cause if they lacked an honest and reasonable belief that charging a person was justified. In reaching these conclusions their Honours followed *Sharp* as opposed to *Mitchell*. The Court of Appeal further held that a prosecutor will "honestly and reasonably believe" that charging a person is justified if the evidence would lead a person of ordinary caution and prudence to conclude that it was warranted. Their Honours held however that a prosecutor need not actually believe that an accused is guilty. It is sufficient that they honestly and reasonably believed that there was a proper case to put before a Court.

The Court of Appeal further held that malice will be proved if an accused can show that a prosecutor was motivated by spite, ill-will or by improper motives towards the accused. This could include succumbing to pressure from bureaucratic superiors to lay a charge. In this case however there were no improper motives. The pressure to charge the Appellant existed because there was a “prima facie case” against him.

The grounds of appeal include:

- The Court of Appeal erred in determining the appeal and cross-appeal by formulating and applying an incorrect test for determining absence of reasonable cause in a case of malicious prosecution.
- The Court of Appeal erred in finding that the Appellant had not established absence of reasonable and probable cause to lay the charge in respect of D.
- The Court of Appeal erred in finding that a reasonable prosecutor, exercising 'prudence and judgment' would have been justified in laying the charge in respect of C.
- The Court of Appeal erred in finding that malice had not been established in respect of charging C and D.